

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
MISC APPLICATION No 266 OF 2018**

1. **MULAWA HUSSEIN TENYWA**
2. **WAISWA MULAWA HASSAN** :..... **APPLICANTS**

VERSUS

1. **MULAWA ASUMAN**
2. **MULAWA ALIMANSI** :..... **RESPONDENTS**

BEFORE HON. JUSTICE MICHAEL ELUBU

RULING

This is a ruling following a preliminary point of law that was raised by the Respondents.

The background is that the applicants, **MULAWA HUSSEIN TENYWA** and **WAISWA MULAWA HASSAN** filed this application by chamber Summons, seeking orders that **M.A No.102 of 2018**, be dismissed for failure to effect service of summons on the applicants; they also prayed for costs.

The respondents are **MULAWA ASUMAN** and **MULAWA ALIMANSI**.

At the commencement of the hearing, Counsel for the Respondents Mr. Serunjogi Brian took 3 points of law which in his view would dispose of the application. Mr. Were David appeared for the Respondents.

The 1st objection raised was this application had been filed on the 24/9/2018 and endorsed by the learned Registrar on the 27th /9/2018. It was served on the Respondents on 17/11/2018. It is argued that this delay offends **O.12 r 3(2) of The Civil Procedure Rules** which stipulates that once filed an interlocutory application must be served on the opposite party within 15 days. The respondents rely on the case of **STOP and SEE (U)LTD VS. TROPICAL AFRICA BANK M.A 333/2010 (Commercial Court)** where the court emphasised that the timelines in O.12 r.3(2) are strict.

The 2nd objection is that Counsel for the applicants in the instant application Mr. David Were Mukoche also instituted Civil Suit No. 87/2017 on behalf of the Plaintiff called ADIDWA ABDU. This application stems from that Civil Suit. The 5th defendant in that Civil Suit is MULAWA HUSSEIN TENYWA and the 6th is WAISWA MULAWA HASSAN. That Counsel also instituted C.S. No.202/2017 in the Chief Magistrate's Court of Iganga and in that suit he represents the Defendants in C.S No. 87/2017. These matters all resolved around the same subject matter which is land situate at Iganga Plot 22A.

That Counsels conduct offends Rule 4 of **The Advocates Professional Conduct Regulations**.

It is also submitted that there is a clear case of conflict of interest which shows connivance. Counsel cited **A.P.C LOBO & ANOR VS. SALEH SALIM DHIYEBI and OTHERS (1961) E.A. 223**.

The 3rd objection attacks the Jurat of the affidavit supporting this application. It is the contention of the respondent that the person deposing the affidavit is not named. That there are different sources of information referred to. That the schedule to the commissioner for **Oaths Act Cap 5 in Rule 7**.

The applicant opposes these Preliminary Objections.

It is the contention of Counsel for the applicant that it is true the application was filed 27/9/2018 but as seen from Annexure "A" of the rejoinder, by 2/10/18 the application had not been fixed. That the affidavit of the process server shows that he only received the application 13/11/2018 and served the respondents on the 16/11/18.

That the application could not be served before a date was given by court. That it is settled law that delays attributed to court cannot be visited on litigants (**see ERIDADI TITO NSUBUGA VS. A-G KALR 599**). That the applicants were vigilant but the delay was attributable to court which did not issue the summons.

On the 2nd Preliminary Objection Counsel argued that there was no conflict of interest. That to constitute a conflict, there must be a fiduciary relationship between the client and Counsel. That in the instant case, he represents the applicants who are Plaintiffs in Civil Suit No. 202/17 in the Iganga Chief Magistrate's Court. That all the suits are on different subject matters 87/2017 is a breach of contract, Civil Suit No. 102/17 centres around cancellation of Letters of Administration.

That in 87/2017 the applicants admit the Plaintiffs claim. It is therefore true that the Plaintiffs in Civil No.87/2017 and this application share a common interest. That Counsel has never taken instructions from the Respondents in this suit. They are not former clients. That the clients reserve a constitutional right to retain Counsel of their choice.

The 3rd objection is about who deposed the affidavit. It is the submission of Counsel that the affidavit clearly indicates in the 1st paragraph that the deponent as MULAWA HUSSEIN TENYWA. The document clearly speaks for itself and has no defect.

That in **NANDHUBU PAUL V MUKWAYA M.A. No. 121/2017** it was held that a defect in the Jurat cannot be allowed to vitiate an affidavit in view of Art 126 (2) (e) of The Constitution. That not every act of incorrectness will result in nullifying proceedings unless the nullity is of a most fundamental nature.

This Court will resolve the objections in the order that they have been raised.

On the first preliminary point it is true that the Chamber Summons were filed on the 25th of September 2018. The affidavit of service deposed by one MUYAKA FRED states that he received the chamber summons on the 13th of November 2018 and served the respondents on 16th of November 2018.

There is also a letter from the applicants Counsel dated 2/10/18 praying for the matter to be fixed. There is no question therefore, that serve of chamber summons was effected after about 47 days.

It is also true that by the 2/10/18 the Chamber Summons had not been given a date. The delay to fix the hearing date is wholly attributable to court and not the litigant.

In **Soroti M.C Vs. PAL AGENCIES (U) LTD M.A. 181/2012** Justice Obura noted that an application is by its nature summons issued by court requiring the respondent to attend court on the appointed date and time. It becomes valid only after it has been given a date, signed and sealed.

I wholly agree with this position.

Before the application in this instant case was given a date, it was incomplete and only acquired legitimacy when it was given a hearing date.

For that reason, and considering that there is no evidence to rebut the contention that the date was obtained on the 13/11/2018, then the application cannot be said to

have been served out of time for purposes of **O.12 r 3(2) of the Civil Procedure Code Act.**

It is also important to note that litigants have absolutely no say over the fixing of Court matters which remains a preserve of the presiding judicial officer.

For this reason the application was not out of time and the first preliminary objection fails.

The second objection challenges Counsel Were representing the applicants in this application but also filing a suit against them in C.S NO.87/2017. Counsel for the applicant has on the other hand stated that the applicant, as defendants in C.S 87/17 have admitted the Plaintiff's claim.

A perusal of the Written Statement of defence in C.S 87/17 indeed shows that these two applicants, as defendants No.5 and No.6 in Civil Suit No. 87/2017 have admitted the claim.

In determining whether there was conflict of interest in this case I have looked at **The Advocates (Professional Conduct) Regulations S.1. 267-2** and have found no specific provision regulating conduct in cases of client conflict.

In other common law jurisdictions, England for example, **Rule 47.1 of The Guide to The Professional Conduct of Solicitors** states that a Solicitor should not accept instructions to act for two or more clients where there is a conflict or a significant risk of a conflict between the interests of those clients. It follows therefore that a Solicitor must never act for both plaintiff and defendant in a contested matter.

In Clark Boyce V Mouat (1993) 4. All. E.R. 268 It was held that:

A solicitor's loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interests are in opposition to those of another client. If there is a conflict in his responsibilities to one or both he must ensure that he fully discloses the material facts to both clients and obtains their informed consent to his so acting: "No agent who has accepted an employment from one principal can in law accept an engagement inconsistent with his duty to the first principal from a second principal, unless he makes the fullest disclosure to each principal of his interest, and obtains the consent of each principal to the double employment"

The test therefore is whether there is a clash of interests between the parties.

Secondly, whether the parties knowing that Counsel has instructions from the other side, and aware that a conflict may arise give their informed consent for Counsel to act on their behalf.

In the instant case, there is clearly no conflict of interest. The applicants here admitted the entire claim in Civil Suit 87/2017 where they are defendants.

I find that the circumstances of this case do not merit a finding of a client conflict in the interests of the applicants here and their position as defendants in Civil Suit 87/2017.

In light of this the 2nd preliminary point must fail.

The last point turns on the fact that the affidavit in support does not state the name of the person who signed the affidavit.

I have perused the affidavit. It states in the 1st paragraph that the deponent is MULAWA HUSSEIN TENYWA. On the last page, it bears a signature of the

person affirming. The affidavit does not state the name of the person signing on this last page (the Jurat).

This court finds that the affidavit clearly states who the deponent is. There can be no possibility of mistaking who is represented in the oath as the person affirming.

In any event it was held by the Court of Appeal in **SAGGU V ROADMASTER CYCLES LTD (2002) I EA 258** that It is trite that the defect in the jurat or any irregularity in the form of the affidavit cannot be allowed to vitiate an affidavit in view of Article 126(e) of the 1995 Constitution, which stipulates that substantive justice shall be administered without undue regard to technicalities.

On the basis of this authority alone the 3rd objection will be overruled.

In the result the Respondents three preliminary objections are dismissed with costs.

Dated at Jinja this 15th Day of February 2019.



MICHAEL ELUBU

JUDGE

27/2/19

Applicant present,
deposits absent,
no depositions for the
present. clear.
over & only depositions in the presence of
me absent.

